

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**O.J.APPEAL No. 51 of 2003
In
COMPANY PETITION No. 210 of 2002****For Approval and Signature:****HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ? **Yes**
- 2 To be referred to the Reporter or not ? **Yes**
- 3 Whether their Lordships wish to see the fair copy of the judgment ? **No**
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **No**
- 5 Whether it is to be circulated to the Company judge ? **Yes**

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SATELLITE TELEVISION ASIAN REGION LIMITED & 1 - Appellant(s)
Versus
KUNVAR AJAY DESINER SAREE(P) LTD. - Opponent(s)

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Appearance :
MR SN SHELAT with MR CL SONI for Appellant(s) : 1 - 2.
MR SN SOPARKAR with MRS SWATI SOPARKAR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH**and****HONOURABLE MR.JUSTICE K.A.PUJ****Date : 05/09/2007****CAV JUDGMENT****(Per : HONOURABLE MR.JUSTICE M.S.SHAH)**

This appeal is directed against the judgment and order dated 25.4.2003 of the learned Company Judge dismissing Company Petition No.210 of 2002 for winding up Kunvar Ajay Designer Saree (P) Ltd. hereinafter referred to as “the respondent-Company” or “the Company”.

2. The case of the appellant-petitioning creditors is that the first appellant is engaged in the business of telecasting entertainment and other programmes and also commercials on various satellite television channels. Star India Private Ltd. (the second appellant herein) is an independent representative in India for procuring the advertisements to be broadcast on Star Channels being run by the first appellant. The second appellant accordingly procures instructions for advertisements from advertisers for telecast on Star Channels belonging to the first appellant. On 25.10.2001 and 24.12.2001, the respondent-Company entered into two agreements with the second appellant for booking of commercial slots for telecasting its products on Star Channels. As per the agreements, the respondent-Company agreed to pay the invoice amounts within 30 days and in case of delayed payments interest at the rate of 2% p.m.. In pursuance of the above agreements, the respondent-Company's commercials were telecast on Star Channels on selected dates, times and during selected programmes from November 2001 to June 2002. After telecast of the advertisements, the second appellant raised invoices from time to time for total amounts of Rs.19,91,78,218/- (Rs.19.92 crores approx.).

In June 2002 the respondent-Company issued post-dated cheques in favour of the second appellant towards clearing of outstanding dues, out of which, the first five cheques were honoured, but the next two cheques were dishonoured and the

next cheque drawn by the respondent-Company in favour of the second appellant for Rs.1.10 crores was also dishonoured by the bankers of the respondent-Company in June 2002.

After filing of the criminal complaint by the second appellant against the respondent-Company under Section 138 of the Negotiable Instruments Act, 1881, a Director of the respondent-Company had a meeting with the second appellant on 14.8.2002, at which the respondent-Company agreed to pay a sum of Rs.19.87 crores in full and final settlement of its dues in respect of advertisements telecast on Star network upto June 2002. This was also recorded in the letter dated 19.8.2002 (Annexure-D to company petition). On 2.9.2002, the Director of the respondent-Company had another meeting with the second appellant and while confirming that a sum of Rs.19.87 crores was owed by the respondent-Company to the second appellant in respect of advertisements telecast upto 30.6.2002, the payment schedule was revised as under :-

- (a) Rs.4 crores to be paid by 31.12.2002;
- (b) Rs.15 crores to be paid by 20 equal monthly installments of Rs.75 lakhs each commencing from September 2002;
- (c) The final installment would be of Rs.87 lakhs and odd amount;

This revised payment schedule as indicated at the meeting on 2.9.2002 was incorporated in the respondent-Company's letter dated 3.9.2002 (Annexure-E) to the second appellant.

However, on 27.9.2002 (Annexure-F), the respondent-Company informed the second appellant that "due to financial

problem as well as dull market we are unable to pay Rs.75 lakhs in September month for which we will give you Rs.One Crore each (75 Lakhs + 25 Lakhs) for the months October, November & December 2002”.

Towards the above liability, the respondent-Company sent demand drafts aggregating to Rs.25 lakhs along with the letter dated 16.10.2002 (Annexure-G). While sending these drafts of Rs.25 lakhs, the respondent-Company stated in the said letter that, “the balance of Rs.75 lakhs will be cleared before the end of this month (October 2002) as mentioned in the letter (dated 27.9.2002)”.

As the respondent-Company did not release the balance payment, the second appellant sent a statutory notice dated 18.10.2002 to the respondent-Company under Section 434 of the Companies Act, 1956 calling upon the respondent-Company to pay Rs.20.25 crores (including Rs.19.87 crores being the outstanding dues and Rs.37 lakhs and odd amount being the interest accrued thereon upto 30.9.2002). The notice stated that in case of the respondent-Company's failure to pay the said amount within 21 days from the date of receipt of the notice, the second appellant shall file a winding up petition against the respondent-Company. The above notice was received by the respondent-Company on 21.10.2002, but it neither complied with nor replied to the said notice. Therefore, the appellants filed the winding up petition on 20.11.2002.

3. The company petition came up for preliminary hearing on 25.11.2002 when the learned Company Judge passed the following order :-

“Notice returnable on 17.12.2002.”

On 14.12.2002, - Advocates of the appellants issued a public notice in two Gujarat newspapers (as translated in English) which read as under:-

Public Notice
KUNVAR AJAY DESIGNER SAREE PVT. LTD.

The general public is hereby informed that, Kunvar Ajay Designer Saree Pvt. Ltd. (Company) having their registered office at B-1, Thakkar Palace, Race Course Road, Surat - 395002 and who have outstanding dues of Rs.21,96,50,532/- to be paid to our client, namely Satellite Television, Asian Region Ltd. and Star India Pvt. Ltd. for advertising their products such as Dandi Salt, Kunvar Ajay Sarees and Friendly wash Detergent powder on Star TV network.

Against the company and its Directors over and above the criminal proceedings under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881, for dishonour of cheque, our clients have also filed Company Petition No.210 of 2002 against the Company before the Hon'ble High Court of Gujarat for winding up, for appointment of Liquidator and other ancillary reliefs.

If any person, financial institution and/or firm and/or association of persons and/or company enters into any transaction in any manner with the Company to grant loan, make investment or any proceedings for taking over the Company or for merger/amalgamation with the Company and any other proceedings or transaction with the Company in relation to its movable properties and/or immovable properties including the brand name/(names) - Dandi Salt, Kunvar Ajay Sarees and friendly wash detergent powder, if any one makes any such deal then against such Company my clients will file suit for making recovery, which they have filed before the Hon'ble Gujarat High Court in Company Petition No.210 of 2002. Accordingly on any kind of transaction, our clients will have their first claim.

Dt.14.12.2002

Kadam & Co.
Advocates,
1st Floor, Pittale Prasad,
17, Shankersheth Road,
Grant Road 5),
Mumbai - 400 007.

4. Thereafter the respondent-Company filed Company Application No.407 of 2002 contending that even before the hearing of the show cause notice issued on the company petition, the appellants published a notice of winding up of the respondent-Company in the newspapers without directions of the Company Court. Therefore, besides harming reputation of the respondent-Company it amounted to abuse of the process of the Court requiring summary dismissal of the company petition with exemplary costs.

The appellants herein resisted the application by filing reply pointing out that Mr Suresh Chand Agarwal, Managing Director of the respondent-Company had a long meeting with the second appellant on 03.12.2002 when the representatives of other advertising agencies and TV channels were also present. During the said meeting, it was stated by the said Director that they were expecting loans from the banks and financial institutions against mortgage of the Company's assets. The appellants, therefore, deemed it necessary to inform the members of the public about the claim of the appellants against the respondent-Company so that the future multiple legal proceedings can be avoided and, therefore, with a bonafide and genuine intention, the appellants issued the above public notice dated 14.12.2002 in two Gujarati newspapers. It was submitted that the notice was informative and cautionary in nature, that the respondent-Company had admitted its liability and thereafter failed to discharge the same and was also facing proceedings under Section 138 of the Negotiable Instruments Act and, therefore, there was no defamation of the respondent-Company. It was also submitted that reference to the winding up petition was not a notice of winding up, as alleged, and finally the appellants' stated in paragraph 9 of their counter affidavit as under:-

“Without prejudice to the aforesaid and without admitting the applicant's (i.e. respondent-Company herein) contention that the respondents (appellants herein) have abused the process of Court, if this Hon'ble Court endorses the applicant's contention, then I most respectfully submit to this Hon'ble Court that taking into consideration the legitimacy of the respondents' claim against the applicant and the degree of loss, harm and damage that would be caused to the respondents (i.e. appellants herein) on account of grant of relief in favour of the applicant (i.e. dismissal of winding up petition), the same may be condoned by this Hon'ble Court.

After hearing the learned counsel for the parties, the learned Company Judge by judgment dated 25.4.2003 dismissed the winding up petition on the ground that the advertisement dated 14.12.2002 was an abuse of the process of the Court. Hence, this appeal.

5. Mr SN Shelat, learned Senior Counsel with Mr CL Soni for the appellants have made the following submissions :-

5.1 The advertisement in question was not and cannot be construed as an advertisement under Rule 96 of the Company (Court) Rules.

5.2 In any case, there was no abuse of of the process of the Court. That the respondent-Company had admitted its liability to pay Rs.19.87 crores and failed to pay any amount against the said liability except Rs.25 lakhs, and which correspondence was on the record of the winding up petition and the respondent-Company did not reply to the statutory notice dated 18.10.2002 (which was served upon it on 21.10.2002) and the respondent-Company chose not to file any reply on merits - these facts were sufficient to

indicate that the Company had no defence on merits and, therefore, issuance of the advertisement as abuse of the process of the Court was pleaded malafide only to escape the otherwise certain winding up of the respondent-Company. It is also submitted that the Company had already lost its reputation in the market as the respondent-Company is heavily indebted to various other broadcasters, such as SET Rs.243 lakhs, Doordarshan Rs.171 lakhs, Sri Adhikari Brothers Rs.58 lakhs etc. and that the said broadcasters had also filed complaints against the respondent-Company with the Indian Broadcasting Foundation (IBF), which is the largest organization representing television broadcasters in India, founded to protect and secure interests of the Indian television industry and that the said IBF has blacklisted the respondent-Company banning telecast of its advertisements on all television channels and that the Directors of the respondent-Company had also failed to remain present before the learned Magistrate's Court due to which arrest warrants were issued and since the arrest warrants could not be executed, the police authorities of Ring Road Police Station, Surat had submitted that report to the Metropolitan Magistrate's Court at Andheri.

5.3 Reliance is placed on several authorities, more particularly in *M/s Madhusudan Gordhandas and Co. vs. Madhu Woolen industries Pvt. Ltd.*, AIR 1971 SC 2600 (para 13) and in *National Conduits vs. SS Arora*, AIR 1968 SC 279 in support of the submission that whether any act of the petitioning creditor would amount to abuse of the process of the Court, would always depend on the facts of a given case, including the defence of the respondent-Company on the merits of the dispute and that advertisement by itself would not amount to abuse of the process of the Court if the surrounding circumstances do not support such an inference or if surrounding circumstances run counter to such an inference.

6. On the other hand, Mr Soparkar for the respondent-Company has opposed the appeal and relying on certain decisions discussed hereinafter, has submitted that publication of the advertisement in question by itself amounted to an abuse of the process of the Court and, therefore, it was not necessary for the respondent-Company to file any reply on merits. It is also submitted that it was not necessary for the respondent-Company to file any counter affidavit on merits either in the winding up petition or in the present appeal and that if at all the Court considers it necessary that a counter affidavit should be filed on merits, the matter may be remitted back to the learned Company Judge for deciding this question afresh.

7. In view of the last submission, this Court specifically called upon the learned counsel for the respondent-Company to state whether it was agreeable to go back to the learned Company Judge for a fresh decision on the question whether there was an abuse of the process of the Court and on the further question whether the Company petition deserves to be dismissed on that ground after filing an affidavit-in-reply on merits. The learned counsel, however, stated that the respondent-Company would prefer to invite the decision of this Court on the contentions raised by it which had appealed to the learned Company Judge and that if at all this Court were to hold that the question could be decided only after filing of reply on merits, the matter may go back to the learned Company Judge for a fresh decision on the question whether there was any abuse of the process of the Court.

8. Before dealing with the rival submissions, we may set out the relevant statutory provisions, particularly Rules 24 and 96 of the Companies (Court) Rules, 1959, which read as under :-

Part I - General

“24(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge.

(2) Except in the case of a petition to wind up a Company, the Judge may, if he thinks fit, dispense with any advertisement required by these Rules.

Part III - Winding up Winding up by the Court

96. Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisement to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.”

9. The position prevailing in England is explained as under in the Palmer's Company Law (para 15.235).

“Advertisement of petition :

Unless the Court otherwise directs, every petition is to be advertised in the Gazette not less than seven clear days (excluding Saturdays, Sunday and public holidays) after it has been served on the Company and not less than seven clear days before the date fixed for the hearing.

The Court will restrain the issuing of the advertisements when the petition is an abuse of the process of the Court, and may also decide to restrain advertisement when the petition debt is shown to be disputed. The Court must exercise a judgment in this

matter, based upon the particular circumstances made known to it, and will effectively balance the potential for the Company suffering prejudicial publicity in consequence of the advertisement, against the anticipated detriment to the petitioner if the normal procedure of advertisement is postponed. It is an abuse of process to present a petition against a solvent Company as a means of putting pressure on it to pay a debt which is bona fide disputed, and the Court may issue an injunction restraining presentation of the petition where other forms of procedure ought first to be utilized. However, when a winding up petition has been properly presented and is not challenged, and there is no countervailing administration petition pending, or any undertaking that one will be presented, it is very doubtful whether a Judge has power to order that the winding up petition should not be advertised. Where the debt itself was undisputed and there was merely an untested cross-claim against the petitioner by the Company, this was held not to amount to an abuse of process on the part of the petitioner, and the Court refused to restrain advertisement. Where part of a debt was disputed on bona fide grounds, but an undisputed balance remained which was well in excess of the prescribed minimum figure, the petition was allowed to be presented.

If the petition is not duly advertised in accordance with rule 4.11 of the 1986 Rules, the judge may order that it shall be removed from the file. Where a winding up petition is advertised prior to service, in breach of rule 4.11 of the Insolvency Rules, 1986, it will ordinarily be struck out.”

It is true that the English Courts have given a wide meaning to the concept of “advertisement” in order to include even informal communication to third parties like serving a fax copy of the winding up petition to the Company's banker.

““This rigorous approach is understandable, given the commercial harm which can be inflicted upon a Company through the improper use against it of the presentation of a winding up petition. However, where the petitioner is innocent of all impropriety of purpose or conduct, and is

presenting a petition with a view to the recovery of a debt which is not disputed, a valid distinction may be drawn by the Court, in order to deprive the insolvent debtor of a technical basis for making an application to dismiss the petition. Thus, the fact that the petitioner may have notified the debtor's bank of the presentation of the petition may be explained as having been carried out for the purpose of minimizing the risk of wasteful depletion of assets through the bank allowing the Company's account to operate at a time when, by virtue of section 127 of the Act, the disposition of the Company's property will be void. In that event, a more restricted notion of the meaning of "advertisement" was adopted in SN Group plc v. Barclays Bank plc, confining it to the formal act of advertising the petition in the Gazette, as required by rule 4.11(1)."

(emphasis supplied)

10. Even where the English Courts have come to the conclusion that improper advertisement was an abuse of the process of the Court, the Courts have held that there is discretion vested in the Court to decide whether or not to strike out the petition on that ground. For instance, in *Re Doreen Boards Ltd.*, 1996 (1) BCLC Ch D 501, the Court laid down the following principles :-

"Exercise of the discretion where there has been an abuse of process.

In my view there has been here a serious abuse of process. In those circumstances the Court has a discretion whether or not to strike out the petition at this stage. In deciding whether to exercise that discretion in favour of a strike out the Court should take into consideration all the circumstances. It should consider not only the need to discourage this sort of behaviour but also the extent to which a strike out would serve a useful purpose. In *Re Signland Ltd.* Slade J held

that there was an abuse but in the special circumstances of that case declined to strike out. He gave leave for the substitution of an alternative petitioner. He also ordered the petitioner to pay both the company's and the other creditor's costs. It may be that if a case where the advertisement has been very limited in scope and has had no impact on the company it would be appropriate for the Court to register its disapproval in costs alone."

(emphasis supplied)

Court registering its disapproval in terms of costs alone is what the Chancery Court did in *Re a Company* (No.00687 of 1991) (1992) BLCC (Ch.D) 133, after observing that though the advertisement of the petition (in spite of the order that no advertisement of the petition should be made) was an unwise act, it was "not a wanton act which would warrant the Court's displeasure; it is a mistake and a mistake in breach of an order, but not, as I say, contumelious."

In *Re Signland Ltd.* (1982) 2 All ER 609 referred to in the above case of *Re Doreen Boards Ltd.* (supra) Slade J, observed that the Court should discourage premature advertisement as it would be a serious abuse of the whole process of advertisement, but also explained the principal reasons why the rules have directed that advertisement shall take place not less than seven clear days after the service on the Company - (i) to give the company an opportunity to discharge the debt in question, if it is undisputed, before advertisement takes place, and (ii) to enable the Company, if it wishes to dispute the debt, to apply to the Court to restrain advertisement.

This rationale would also indicate that the Court should take a serious view of premature advertisement where the debt is disputed by the Company which is served with the winding-up petition.

11. The leading Supreme Court decisions on the subject are National Conduits (P) Ltd. vs. SS Arora, AIR 1968 SC 279 and M/s Madhusudan Gordhandas and Co. vs. Madhu Woolen industries Pvt. Ltd., AIR 1971 SC 2600.

Noting the distinction between the position in the English law (where the creditor files the winding up petition, and the advertisement is to follow after the specified time lime from the date of service of the petition on the Company, unless the Company moves the Company Court and obtains an order of restraint against advertisement) and the Indian Law (where the advertisement is to be issued after the order of the Court), in National Conduits case (supra), a three Judge Bench of the Apex Court considered the above quoted Company Court Rules and laid down the following principles :-

“When a petition is filed before the High Court for winding up of a Company under the order of the Court, the High Court (i) may issue notice to the Company to show cause why the petition should not be admitted; (ii) may admit the petition and fix a date for hearing, and issue a notice to the Company before giving directions about advertisement of the petition; or (iii) may admit the petition fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. A petition for winding up cannot be placed for hearing before the Court unless the petition is advertised; that is clear from the terms of R. 24(2). That is not to say that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for winding up be not admitted, the Company may show cause and contend that the filing of the petition amounts to an abuse of the process of the Court. If the petition is admitted, it is still open to the Company to move the Court that in the interest of justice or to prevent abuse of the process of Court, the petition be not advertised. Such an application may be made where the Court has issued notice under the last Clause of R. 96, and even when there is an unconditional admission of the petition

for winding up. The power to entertain such an application of the Company is inherent in the Court, and R. 9 of the Companies Court Rules, 1959, which reads :

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such order as may be necessary for the ends of justice to prevent abuse of the process of the Court”,

reiterates that power. In *In re A. Company*, (1894) 2 Ch 349 it was held that if the petition is not presented in good faith and for the legitimate purpose of obtaining a winding up order, but for other purpose, such as putting pressure on the Company, the Court will restrain the advertisement of the petition and stay all further proceedings upon it.”

(emphasis supplied)

The Apex Court also cautioned that advertising the petition as soon as the Court admits the petition would make the Court an instrument, in possible cases of harassment and even of blackmail, for once a petition is advertised, the business of the Company is bound to suffer serious loss and injury.

12. *In M/s Madhusudan Gordhandas case (AIR 1971 SC 2600), the following principles are enunciated by the Apex Court :-*

“20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company.

*21. Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See *Re. A Company* 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See *Re. Tweeds Garages Ltd.*, 1962 Ch. 406). The principles on which the court*

acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

22. Another rule which the Court follows is that if there is opposition to the making of the winding up order by the creditors the Court will consider their wishes and may decline to make the winding up order.

30. Counsel on behalf of the Company contended that the appellants presented the petition out of improper motive. Improper motive can be spelt out where the petition is presented to coerce the Company in satisfying some groundless claims made against it by the petitioner."

(emphasis supplied)

13. Upon an analysis of the above statutory provisions, the decisions of the Apex Court and the precedents of the English Courts, the following principles emerge :-

- (a) Where a winding up petition is presented out of improper motive for harassing the Company to satisfy some groundless claims made against it by the petitioning creditor, such a petition is not to be entertained. For arriving at this conclusion, the Court has to apply the following three principles - (i) the defence of the Company is in good faith and one of substance, (ii) the defence is likely to succeed in point of law, and (iii) the company adduces prima facie proof of the facts on which the defence depends.
- (b) The Court will restrain (or not permit) the advertisement of a winding up petition where the petition is not presented in good faith and for legitimate purpose of obtaining a winding up order, but for other

purposes such as putting pressure on the Company.

- (c) Every citizen has a right to litigate his cause and to seek justice from a Court of law. To use this right to seek remedy by misuse of the judicial process is, to abuse the process of the Court. "Abuse of the process of the Court" would, therefore, involve mens rea. To strike out the winding up petition on this ground, the Court must come to a conclusion that the act complained of was a wanton act reeking with malafides.
- (d) Whether advertisement of a petition without the order of the Court is improper or is an abuse of process of the Court, will depend on the facts and circumstances of each case. Even if the Court comes to a conclusion that the advertisement of a winding up petition without any order of the Court is improper, to arrive at the conclusion that such an advertisement amounts to an abuse of the process of the Court, the Court has to take into consideration, inter-alia, the merits of the dispute to the limited extent (i) whether the Company had admitted the dues or whether the Company had urged any defence to the petitioner's claim in any correspondence prior to the statutory notice, (ii) whether the Company had given any reply to the statutory notice with a modicum of defence, and (iii) whether the Company had filed any reply to the winding up petition on merits raising a modicum of defence.
- (e) To impute mala fides or oblique motive to the petitioning creditor, the Company would be expected to show that the petitioning creditor published the advertisement about the winding up petition without

the order of the Court, because prima-facie -

- (i) the petitioner had no genuine claim and that the petitioner wanted to bring undue pressure on the Company to coerce it to admit such claim and to pay up the disputed debt or
 - (ii) that the Company's defence to the petitioner's claim was such that there was reasonable doubt whether the Company Court may or may not have admitted and advertised the petition and that the petitioner, therefore, wanted to harm the Company's reputation by issuing such advertisement without waiting for the orders of the Court.
- (f) It would not be possible for the Court to dismiss the winding up petition only on the ground of improper advertisement or advertisement of a winding up petition without the orders of the Court without first undertaking at least a preliminary inquiry about genuineness of the petitioner's claim and the defence of the Company as disclosed either in the conduct or correspondence of the Company before the statutory notice, or in reply to the statutory notice, or in the reply affidavit, if any, filed before or alongwith the application for dismissing the winding up petition on the ground of improper advertisement/ advertisement without orders of the Company Court.

14. The commercial advertisements of the respondent Company were telecast on Star channels between November 2001 and June 2002. The respondent Company had issued post dated

cheques in favour of the second appellant, out of which five cheques were honoured, but the cheque for a sum of Rs.1.10 crores was dishonoured on 26.6.2002. Thereafter on 19.8.2002, the respondent Company agreed to pay Rs.19.87 crores to the appellants and by letters dated 3.9.2002 (Annexure "E"), 27.9.2002 (Annexure "F") and 16.10.2002 (Annexure "G") confirmed the same. In view of this material on record, it is clear that the respondent Company had admitted the dues of the appellants to the extent of Rs.19.87 Crores. When the appellants sent a statutory notice to the respondent Company, which was received by it on 21.10.2002, the respondent Company chose not to give any reply to the said notice. Even after service of the winding up petition, the respondent Company did not file any reply to the petition. In fact, by our order dated 25.7.2007, we had given an opportunity to the respondent Company to file affidavit in reply on merits of the disputes between the parties by 6.8.2007. Even then, the Company did not file any reply and all along insisted that it had the right to have the winding up petition dismissed on the ground of improper advertisement without filing any reply on merits. Seen in this light, we are clearly of the view that the advertisement in question published in the newspapers on 14.12.2002, even though not proper, cannot be said to be an abuse of process of the Court.

15. Mr Soparkar, learned counsel for the petitioner has heavily relied on the decision dated 30.7.2007 of the Punjab & Haryana High Court in Amritsar Swadeshi Textile Corporation Pvt. Ltd. vs. Vinod Krishan Khanna in support of his contention that to engage in advertisement in advance of the Court having had an opportunity to determine whether there should be any advertisement at all, by itself amounted to abuse of the process of the Court and that it is not necessary for the respondent Company to file any reply on merits.

16. We have carefully gone through the aforesaid decision dated 30.7.2007 of the Division Bench in Company Appeal No. 2 of 2007 and also the decision of the learned Single Judge of the Punjab & Haryana High Court in Vinod Krishan Khanna vs. Amritsar Swadeshi Textile Corporation P. Ltd., 134 Company Cases 828 giving rise to the above appeal. The above Company Petition was filed under Section 433(f) of the Companies Act to wind up the respondent Company. Notice of the petition was ordered to be issued to the Company on 27.4.2006 to show cause why the petition should not be admitted. Alienation of the assets of the Company, except in due course of the business of the Company, during the pendency of the winding up petition, was ordered to be subject to the final order passed by the Court. After the order was passed, the petitioners not only caused an advertisement to be published in the newspapers making a reference to the winding up petition, and the ad-interim order, but also wrote letters dated 14.6.2006 and 4.8.2006 to Government of India (Director General of Foreign Trade) and the Bankers of the Company respectively, making inter-alia the following misrepresentations and allegations against the Company :-

- (i) the winding up petition was admitted by the Company Court **(in fact, the Company Court had only issued a notice);**
- (ii) the Company Court had granted interim stay against alienation of the assets of the Company **(in fact the Company Court had only directed that alienation of the assets, except in the usual course of business would be subject to the final decision);**
- (iii) the petitioning creditor had filed a civil suit for declaration that the incorporation of the Company was illegal and fraudulent **(in fact the counsel for the**

petitioning creditor had already stated before the Company Court on 27.4.2006 that the civil suit will be withdrawn within one week and the suit was withdrawn on 5.5.2006);

- (iv) there was overwhelming evidence about the illegality and fraud in incorporation of the Company and there was every likelihood of the Court decision going against the fraudulently formed Company and that any decree/registration of charge on a company based on fraud was rendered void-ab-initio;

The respondent Company in that case filed an application contending that the advertisement without any direction of the Court as required under Rule 96 of the Companies (Court) Rules, 1959 and the subsequent letters to the Government and the bankers were an abuse of the process of the Court and that on account thereof, the Company had suffered huge losses.

17. The learned Company Judge who had passed the first order of issuance of notice ultimately held that mere publication of notice to inform the general public about the interim order having been passed by the Court could not be said to be abuse of the process of the Court which may entail dismissal of the petition for winding up. After observing that the petitioner had published a truncated version of the order particularly without disclosing the fact that the Court had issued pre-admission show cause notice, in view of the apology tendered by the petitioners, the learned Company Judge held that the respondent Company was at liberty to claim damages, if any, on account of termination of the contracts resultant to the public notice issued by the petitioners before an appropriate Court and the petitioners were asked to pay costs of Rs.10,000/- to be deposited with the Legal Service Authority, Amritsar.

18. The above order was carried in appeal. The Division Bench of the Punjab & Haryana High Court held that the petitioning creditor in that case was guilty of reprehensible conduct in writing letter to the Government of India and the Director General of Foreign Trade completely misrepresenting the facts and distorting the order of the learned Company Judge. The petitioning creditor had referred to filing of the Civil Suit and its pendency although the Civil Suit was already withdrawn earlier. Similarly, the petitioning creditor had written letter to the bankers of the Company describing the status of the winding up as having been admitted by the Company Judge (although only notice was issued by the Company Judge) and had described the Company as a Company borne out of fraud which had no existence in the eyes of law. All those communications are reproduced in the judgment of the Division Bench. In the facts of the case before it, the Division Bench of the Punjab & Haryana High Court held that there was material that the petitioning creditor had made false and misleading statements.

19. It was on the basis of the above findings of fact that the Division Bench of the Punjab and Haryana High Court made the following observations :-

"In the instant case, the intention of the respondents to over-reach the Court is manifestly clear when they got the publication made in the newspapers and wrote subsequent letters to the Government of India, Ministry of Commerce and Industry, Export Promotion Council and the Union Bank of India and tried to project non-existent proceedings and orders of the Court. Their conduct, both prior to and after the presentation of the petition for winding up, is deplorable and has resulted not only in abuse of the process of the Court, but has also caused immense damage to the appellant.

The order of the learned Company Judge, to our mind, is erroneous as despite the affirmative material before him, he failed to record any finding regarding the abuse of the process of Court which was manifestly clear from the above mentioned conduct of the respondents, as also the communications written by them, which are on record.

.....

We are also of the view that the learned Company Judge failed to return any finding regarding the conduct of the respondents which was material and imperative in view of the categorical stand of the appellant and also in view of the specific material which established gross abuse indulged into by them.

The learned Company Judge went on to accept the apology and condoned the overtly blatant conduct of the respondents in abusing the process of the Court. ...
.....”

(emphasis supplied)

The Division Bench accordingly allowed the appeal and dismissed the petition for winding up.

20. Thus the decision of the Division Bench of the Punjab and Haryana High Court is based on the peculiar facts of that case. On the other hand, in the facts of the present appeal, the advertisement dated 14.12.2002 given by the petitioning creditor in the newspapers referred to pendency of the proceedings against the respondent Company under Section 138 of the Negotiable Instruments Act, 1882 and filing of the present winding up petition without making any incorrect or misleading statement regarding admission of the winding up petition. The advertisement was given with the sole purpose of informing the public at large that the appellants were claiming a sum of Rs.21.96 crores (out of which the respondent-Company had already agreed in writing to pay the principal amount of Rs.19.87 crores in letters written prior to the statutory notice) and that if any person or financial

institution would enter into any transaction with the Company for the purpose of giving loans or for taking over the respondent Company or for entering into amalgamation with the respondent Company, the appellants would file a claim against them also for recovery of their dues. After service of the notice on the winding up petition, the respondent-Company had disclosed to the second appellant that it intended to borrow money to pay off the appellants' dues. When a winding up petition is allowed, it relates back to the date of filing the petition (Section 441 of the Companies Act, 1956) and, therefore, the appellants wanted to claim priority for their dues over subsequent debts. The appellants had thus intended only to forewarn the public at large. We see no malafide intent on the part of the appellants. At the most, it was a mistake not a wanton act. Hence it cannot be said that the appellants had abused the process of the Court.

In the facts and circumstances, it cannot be said on the basis of the material of the Company Petition that the appellants - petitioning creditors had any groundless or baseless claim or that the winding up petition was filed to coerce the Company into admitting the groundless claim. In fact, the respondent Company had already admitted the claim of the appellant - petitioning creditors to the tune of Rs.19.87 Crores in their correspondence prior to the statutory notice.

21. In view of the above findings, it is not necessary to express any opinion on the first contention of the appellant that the advertisement in question was not covered by Rule 96. We have proceeded on the demurrer that it was.

22. As regards the contention of Mr Soparkar that this Court may remand the matter to the learned Company Judge for deciding the question of abuse of the process of the Court after the

respondent Company files a reply before the learned Company Judge on merits, we are not inclined to accede to this request because the Company Petition was filed in the year 2002 and the present OJ Appeal was filed in the year 2003; the dues are in respect of commercial advertisements which were telecast at the request of, and for the benefit of, the respondent Company, between November 2001 and June 2002 and the respondent-Company did not avail of the opportunity given by this Court during pendency of this appeal to file its counter-affidavit on merits. It is, therefore, high time that the Company Petition No. 201 of 2002 is heard on merits at the admission stage at the earliest. The four years that the respondent-Company has earned in this manner is also sufficient not to pass any further order of costs in their favour.

23. We accordingly allow this appeal and set aside the judgment and order dated 25.4.2003 of the learned Company Judge dismissing Company Petition No. 210 of 2002. The parties shall bear their respective costs of this appeal. The Company Petition shall accordingly stand restored to the file of the learned Company Judge taking up Company Petitions as per the present roster. The learned Company Judge shall now proceed to hear and decide Company Petition No. 210 of 2002 at the admission stage on merits as expeditiously as possible after giving one opportunity to the respondent-Company to file its affidavit-in-reply on merits. The matter shall be listed before the learned Company Judge on **10th September, 2007**.

[M.S. SHAH, J.]

[K.A. PUJ, J.]

zgs/sundar-